No. 607

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IN THE

SUPREME COURT OF THE UNITED STATES

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WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit Michigan),
Appellee.

APPLICATION FOR WRIT OF CERTIORARI

ROBERT D. HEITSCH,
Attorney for Plaintiff
and *Appellant.*

Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

AMERICAN BRIEF AND RECORD COMPANY, GRAND RAPIDS 2, MICHIGAN

IN THE

SUPREME COURT OF THE UNITED STATES

Application of William J. Heitsch, Executor of the Estate of Janet H. Heitsch, Deceased, for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review Order affirming the District Court for the Eastern District of Michigan, Southern Division, entered November 19, 1952. In the case of:

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit Michigan),
Appellee.

Now comes William J. Heitsch, Executor of the Estate of Janet H. Heitsch, deceased, appellant in the above entitled cause, by his attorney, Robert D. Heitsch, and hereby respectfully makes application for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the determination made on November 19, 1952, by said United States Court of Appeals for the Sixth Circuit in the above entitled cause. In that connection applicant respectfully shows:

1. He was duly appointed executor of the estate of Janet H. Heitsch, deceased, by the Probate Court for the County of Oakland, Michigan. He paid in behalf of said estate under protests, specifically raising questions of validity hereinafter set forth, certain estate taxes to Giles Kavanagh, United States Collector of Internal Revenue at Detroit, Michigan. Claim was filed for repayment of said taxes on the basis that they were unconstitutional as set

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forth in the protests which was denied. Suit was started in the District Court of the United States for the Eastern District of Michigan, Southern Division, at Detroit, Michigan, for the recovery of the same (Circuit Court of Appeals printed record, pages 1 — 12). Issue was joined thereon (Circuit Court of Appeals printed record, pages 13 — 16).

Trial was had at which most of the essential facts were stipulated (Court of Appeals printed record, pages 17 — 96). Judgment of no cause for action for the defendant was entered (Circuit Court of Appeals printed record, page 156). Appeal was taken to the Circuit Court of Appeals for the Sixth Circuit on April 14, 1951 (Circuit Court of Appeals printed record, page 158).

On November 19, 1952, the United States Court of Appeals for the Sixth Circuit made the following decision affirming the action of the District Court:

"No. 11513
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM J. HEITSCH, Executor of the
Estate of JANET H. HEITSCH, Deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector
of Internal Revenue at Detroit, Michigan,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.
(Decided November 19, 1952)

Before Simons, Chief Judge; McAlister and Miller, Circuit Judges.

Per Curiam. Appellant, as Executor of the Estate of Janet H. Heitsch, deceased, filed suit to recover estate taxes paid by him under protest, attacking various pertinent Internal Revenue Code provisions as

unconstitutional. He contends that Section 3760 (a) and (b), and Section 3761 (a) of Title 26, U. S. C. A., authorizing compromises and closing agreements, are an attempt to confer legislative functions upon the executive department of the government, in violation of Article I, Section 1, of the Federal Constitution, vesting all legislative power in Congress; that the foregoing sections purport to authorize officers of the executive branch to substitute their judgment for legislative authority so as to arrive at a tax which could represent a different percentage of the value of each similar estate in any part of the United States, contrary to Article I, Section 8, of the Constitution, which requires all duties, impositions, and excises to be uniform throughout the United States; that Section 811 (c) 2 governing transfers, in contemplation of death

1. 26 U. S. C., 1496 Ed.

2. Internal Revenue Code, as amended by Section 7 of Act of October 25, 1949, c.720, 63 Stat. 891. or taking effect at death, purported to deprive appellant's decedent of the opportunity afforded others with like estates who did not die within a period of two years after the first effective date of the estate tax, to dispose of her estate by gift, inasmuch as on such effective date, she was confined to a hospital with illness which caused her death; that the difference between estate and gift tax rates was so great as to violate Article I, Section 8, of the Constitution, and also amounted to taking property for public use without just compensation and without due process of law, in derogation of the Fifth Amendment; that no adequate machinery is provided to procure equalization of assessment for estate tax purposes under the estate tax provisions throughout the United States, resulting in the lack of uniformity required by Article I, Section 8; that estate tax rates effective under Section 935 of the Internal Revenue Code were, on September 21, 1941, as to persons dying after that date, so excessive as to deprive beneficiaries of estates of property without due process of law and without just compensation, contrary to the Fifth Amendment; that estate tax provisions encroach up-

on the exclusive functions of the states to control descent and distribution of property, because of the fact that the rates are so excessive that they can not be regarded as a mere taxing incident, and that the machinery set up for administration of the Act and the actual attempt to administer it are so inadequate that they reasonably interfere with and prolong, beyond a point of any reasonable taxing incident, the administration of estates, which is merely a state function, in violation of the Tenth Amendment reserving such rights to the states that the difference between taxes on transfers by gift and disposition of property by will or descent is an attempt to induce dispositions by gift during lifetime rather than by will or descent; that power over such policy was expressly reserved to the states, and under no provision of the Constitution, is delegated to the federal government.

The above mentioned sections of the statute granting authority to the administrative officers named therein to settle and compromise matters relating to tax liability, require them to assess and collect taxes according to the specific rates and incidence of taxation, as set forth in various sections of the Internal Revenue Code. No authority is conferred therein to apply other rates or to exclude taxable items.

3. As amended by Section 401 of the Revenue Act of 1941, c. 412, 55 Stat. 687.

In this case, the constitutional questions with respect to Section 3760 (a) and (b) and Section 3761 (a) and (b) of the Internal Revenue Code are not properly before us for adjudication, for these provisions are concerned with closing agreements and compromises of tax cases; and it was stipulated that no closing agreement or compromise was proposed or entered into in this case, and the district court made findings to this effect. Appellant, therefore, has not shown that he is within the class of persons with respect to whom the Act is claimed to be unconstitutional, and that the alleged unconstitutional features injure him; and it is fundamental that constitutional questions will not be decided upon hypotheses, or in

advance of the necessity for an adjudication. These statutory provisions, in any event, merely provide administrative devices to facilitate the execution of the revenue laws.

As to the uniformity of the estate tax, the constitutional requirement of uniformity of excise taxation is satisfied when, by the provisions of the tax law, the rule of liability under it is the same in all parts of the United States. The same estate tax rates are applied generally throughout the United States. Opportunities to settle and compromise disputes as to the existence of tax liabilities are available to all taxpayers throughout the nation under the existing provisions of the Internal Revenue Code. Hence, the federal estate tax statute meets the constitutional test of uniformity.

As to the requirement of inclusion within the gross estate of the value of property transferred in contemplation of death, and the provision for a rebuttable presumption that any transfer of a material part of such property made by a decedent within two years prior to his death, was made in contemplation of death, it appears that no such transfers made by decedent within her lifetime were included in her taxable estate. The attack upon the constitutionality of the statute because of these requirements and provisions is, for appellant, based purely on a hypothesis. He does not come within the class of persons with respect to whom the Act is unconstitutional and who suffer thereby.

The fact that there were differences of considerable amount between gift taxes and estate taxes does not result in the taking of property without due process of law. It was within the power of Congress to tax both gifts and estates and its motives are not open to judicial scrutiny. Moreover, the contention that the estate tax rates were so excessive as to constitute the taking of property without due process of law, contrary to the Fifth Amendment, is without merit. Appellant only refers to the tax paid by the estate of which he is executor, and nothing is submitted to overcome the presumption of the constitutionality of the Act. The argument that the variance between the

gift tax rates, and the estate tax rates in effect on November 8, 1941, constituted an attempt by Congress to control the devolution of property in derogation of the rights secured to the states can not be sustained; an dthe same may be said of appellant's contention that Congress in the statutory provisions governing the estate tax, attempted to induce disposition by gift during lifetime rather than by will or descent. The motives of Congress in enacting laws are beyond the scope of judicial inquiry for the purpose of questioning such legislation. The burden is upon one who attacks the constitutionality of a statute, and the presumption is in favor of constitutionality. We find no denial of due process in the statutory provisions.

In consideration of the foregoing, the judgment of the district court is affirmed."

Applicant hereby seeks leave to review said decision of the Sixth Circuit for the following reasons:

1. The determination that the constitutional questions with respect to Sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.), and Section 3761 (a) and (b) Internal Revenue Code (Section 26.3761 (a) and (b) U. S. C. A.) were not properly before the court for adjudication because it was stipulated that no closing agreement or compromise was proposed or entered into in this case, is in conflict with the decision in the case of *Ely-Walker Drygoods Company vs. United States*, 34 Fed. 2d. 429, by the United States Court of Appeals, Eighth Circuit.

2. Said sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.), which expressly provide for compromises and settlement agreements as to federal taxes (in this case Federal estate taxes levied under Section 810 I. R. C. (26.810 U. S. C. A.) and Section 935 I. R. C. (26.935) U. S. C. A.) render such taxes void because in violation of Article I, Section 1, of the United States Constitution.

3. Said Sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.) render

such taxes void because of the uniformity requirements in Articles I, Section 8, United States Constitution.

4. Said Sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.) render such taxes void because in violation of Amendment V of the Constitution of the United States.

5. The wide variance between estate tax rates levied under Section 810 I. R. C. and 935 I. R. C. (Sections 26.810 and 26.935 U. S. C. A.) as of November 8, 1941, and the taxes levied under the gift tax rates, Section 1001 I. R. C. (Section 26.1001 U. S. C. A.) constitute an attempt on the part of the United States government to influence persons in the disposition of their estates in violation of the Fifth and Tenth Amendments of the Constitution of the United States.

6. The estate tax rates in effect on November 8, 1941, under Section 935 I. R. C. (Section 226.935 U. S. C. A.) were so excessive as to constitute the taking of property without due process of law, contrary to the provisions of the Fifth and Tenth Amendments to the Constitution of the United States.

A further question of practice which the application may involve is:

Within the time for applying for writ of certiorari to review the decision of a Circuit Court of Appeals, is the Circuit Court of Appeals the proper place to apply for substitution as party defendant of a successor officer, in this case federal director of Internal Revenue, who succeeds to all of the rights and responsibilities of a predecessor officer, in this case federal collector of Internal Revenue, the succession in office having occurred after the case reached the Circuit Court of Appeals?

The constitutional statutory provisions which we believe authorize this review are as follows:

1. U. S. Constitution Article III, Sections 1 and 2,
2. Section 28.1254 (1) U. S. C. A.,
3. U. S. Supreme Court Rule 38, Section 5 (b).

We respectfully ask that the writ of certiorari be granted to review these questions.

We develop in the attached brief the reasons why we believe the questions here presented are substantial.

Respectfully submitted,

William J. Heitsch,
Executor of the Estate of
Janet H. Heitsch, Deceased.

By Robert Dawson Heitsch,
His Attorney.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased,
Plaintiff and Appellant,
vs. No. 11513

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan,
Defendant and Appellee.

NOTICE OF HEARING

TO:

Philip A. Hart
U. S. District Attorney,
Federal Building,
Detroit, Michigan.

Please take notice that the within motion will be brought on for hearing on Monday, February 2, 1953.

Robert D. Heitsch,
Attorney for Plaintiff
and Appellant.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

Dated: January 20, 1953.

UNITED STATES OF AMERICA
UNTED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM J. HEITSCH, Executor of the
Estate of JANET H. HEITSCH, Deceased,
Plaintiff and Appellant,

vs. No. 11513

GILES KAVANAGH, United States Collector of
Internal Revenue at Detroit, Michigan,
Defendant and Appellee.

MOTION TO SUBSTITUTE DEFENDANT AND APPELLEE

Now comes the plaintiff and appellant by his attorney, Robert D. Heitsch, and moves the court now here for an order substituting Albert M. Menninger, United States Director of Internal Revenue at Detroit, Michigan, for Giles Kavanagh, United States Collector of Internal Revenue at Detroit, Michigan, as defendant and appellee in the above cause.

This motion is based upon the files and records in said cause and the affidavit of Robert D. Heitsch, hereto attatched and made a part hereof.

Robert D. Heitsch,
Attorney for Plaintiff
and Appellant.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

Dated: January 20, 1953.

STATE OF MICHIGAN
SS.
COUNTY OF OAKLAND

Robert D. Heitsch, being duly sworn, deposes and says that he is the attorney for the plaintiff and appellant in the above entitled cause.

Deponent further says that within the last six months there has been substituted for the office of United States Collector of Internal Revenue at Detroit, Michigan, the office of United States Director of Internal Revenue at Detroit, Michigan.

Deponent further says that within the last six months and subsequent to the appeal taken from the District Court to this court in said cause Giles Kavanagh, former United Ctates Collector of Internal Revenue at Detroit, Michigan, has died and Albert M. Menninger has been appointed to the office of United States Director of Internal Revenue at Detroit, Michigan; that he has taken over the official duties of the former United States Collector of Internal Revenue at Detroit, Michigan, and should be substituted as party defendant and appellee in the above entitled cause.

Robert D. Heitsch.

Subscribed and sworn to before me this 20th day of January, A. D. 1953.

Irene Powers,
Notary Public, Oakland County, Mich.
My commission expires October 16, 1955.